LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 1 1957
JOHN T. FEY, Clerk

No. 71

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1957

I. N. GORDON,
Appellant,

v.

THE STATE OF TEXAS
Appellee.

BRIEF OF APPELLEE

WILL WILSON
Attorney General of Texas

C. W. RICHARDS
Assistant Attorney General of Texas
Capitol Station
Austin, Texas

Attorneys of Record for the State of Texas, Appellee.

SUBJECT INDEX

	Page
Opinion of Court Below	1-2
Concise Statement of the Facts	2-3
Appellee's Counterpoints 1 and 2	3
Summary of Argument	4
Counterpoint 1 (Restated)	4
Argument In Support of Counterpoint 1	4-7
Counterpoint 2 (Restated)	7
Argument In Support of Counterpoint 2	7-12
Conclusion	12-13
Proof of Service	13
Appendix	14-20

TABLE OF CASES CITED

	Page
Boles v. State, 132 S.W.2d 881	5, 6, 8
Carter v. Virginia, 321 U.S. 131	11
Cartlidge v. Rainey, 168 F.2d 841 335 U.S. 885	9
Chambless v. State, 216 S.W.2d 203	6
Duckworth v. Arkansas, 314 U.S. 390	10
Fogle v. State, 111 S.W.2d 246	8
Horton v. State, 105 S.W.2d 669	6
Wyble v. State, 147 S.W.2d 243	6
Ziffrin v. Reeves, 308 U.S. 132	9

TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS

Article 1, Section 8, Clause 3, Const. of the U.S.	4, 7, 10
Article 1, Section 10, Clause 2, Const. of the U.S.	4, 6, 7
21st Amendment to Const. of U.S.	5, 10, 12

Texas Penal Code

Article 666-1	4
Article 666-3a	4
Article 666-4(a)	9
Article 666-8	8
Article 666-15 (12)	11
Article 666-17 (13)	4
Article 666-17 (32)	5
Article 666-21	5, 6, 11
Article 666-23a (4)	5, 11
Article 666-27 (a)	8

No. 71

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1957

I. N. GORDON,
Appellant,

v.

THE STATE OF TEXAS
Appellee.

BRIEF OF APPELLEE

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

OPINION OF THE COURT BELOW

The judgment of the Court of Criminal Appeals of the State of Texas was rendered on May 23, 1956, (R. 22) and rehearing denied June 27, 1956. (R. 26). The opinion of the Court of Criminal Appeals of the State of Texas has not yet been officially re-

ported, but is set out in full in the Transcript of Record. (R. 18-21).

CONCISE STATEMENT OF THE FACTS

Appellant, accompanied by his wife and daughter, entered the United States from the Republic of Mexico at the port of entry at Hidalgo, Texas, at which time he had in his possession eleven fifth-gallons of rum, each of which contained more than one-half of one (½ of 1%) percent alcohol by volume, which had been purchased in the Republic of Mexico. (R. 32-33). An agent of the Texas Liquor Control Board requested appellant to pay the tax imposed by the State of Texas on the liquor and that a stamp evidencing such payment be affixed to the bottles, the payment of which was refused by appellant and his arrest followed. Appellant refused to pay the tax due the State of Texas, contending that such tax was unconstitutional as to any liquor which appellant was merely carrying through the State of Texas. (R. 33-34). Appellant was arrested and charged with the possession of an illicit alcoholic beverage containing more than one-half of one per-cent of alcohol by volume upon which the tax due to the State of Texas had not been paid. (R. 1). Appellant testified at the trial that he had purchased the rum in the Republic of Mexico intending to carry it through the State of Texas upon his journey to the State of North Carolina where it was intended for the personal use of the appellant and his companions, and was not at any time intended for resale, use, or disposal in the State of Texas. At the time he was arrested ten fifth-gallons were in the

original packages, one bottle having been broken after seizure by officers of the Liquor Control Board. (R. 34-35). Appellant was tried by a jury which found him guilty of the possession of an illicit alcoholic beverage not contained in a container to which was affixed a tax stamp or other evidence showing the payment of taxes due the State of Texas and fined $100.00. (R. 9-11). Upon appeal to the Court of Criminal Appeals of the State of Texas the judgment of the County Court of Law of Hidalgo County, Texas, was affirmed. (R. 22).

APPELLEE'S COUNTERPOINTS

1. The tax in question which was levied upon intoxicating liquor unlawfully possessed by appellant within the State of Texas did not contravene Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, since it was not a tax or duty on the importation of goods into the continental limits of the United States from a foreign country. (In reply to Appellant's Contention No. 1).

2. The tax in question, being based upon the unlawful possession of intoxicating liquor within the State of Texas, did not contravene Article 1, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States, since, under the laws of the State of Texas, appellant had not qualified as a carrier to transport such intoxicating liquor in interstate commerce from the Republic of Mexico through the State of Texas to the State of North Carolina. (In reply to Appellant's Contention No. 2).

SUMMARY OF ARGUMENT

The Court of Criminal Appeals of the State of Texas having construed the provisions of Article 666-21, Vernon's Penal Code of Texas, which imposes a tax upon any illicit beverage unlawfully imported into the State of Texas to be valid, the imposition of such tax does not violate either Article I, Section 10, Clause 2 (the Export-Import Clause), or Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States.

COUNTERPOINT 1
(Restated)

1. The tax in question which was levied upon intoxicating liquor unlawfully possessed by appellant within the State of Texas did not contravene Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, since it was not a tax or duty on the importation of goods into the continental limits of the United States from a foreign country. (In reply to Appellant's Contention No. 1).

ARGUMENT IN SUPPORT OF COUNTERPOINT 1

An illicit beverage, as defined by the Texas Liquor Control Act, is any alcoholic beverage imported in violation of the Act or upon which any tax imposed by the State of Texas has not been paid and the tax stamp affixed thereto. Art. 666-3a, Sec. (4), Vernon's Texas Penal Code, (App. p. 16). It is unlawful to possess any illicit beverage in the State of Texas. Art. 666-17, Sec. (13), Vernon's Texas Penal Code,

(App. p. 18). However, any person may bring into the State of Texas not more than one quart of liquor for his own personal use, provided that he shall pay the tax and affix thereto the required state tax stamp. Art. 666-23a, Sec. (4), Vernon's Penal Code (App. p. 19).

Article 666-21, Vernon's Texas Penal Code (App. pp. 18-19), levies and imposes a tax upon the first possession of any liquor imported into the State of Texas, and for tax purposes only, distilled spirits imported from any foreign country are subject to taxation and must have affixed thereto the appropriate tax stamp for distilled spirits. Art. 666-17, Sec. (32), Vernon's Texas Penal Code (App. p. 18).

Construeing the foregoing provisions of the Texas Liquor Control Act in the light of the legislative intent in their enactment under Section 2 of the 21st Amendment to the Constitution of the United States, it is clear that the tax in question is one levied upon the possession, legal or illegal, of certain grades of alcoholic beverages within the State of Texas, and is not a tax upon goods imported from a foreign country into the continental limits of the United States.

The Court of Criminal Appeals, the court of last resort in Texas having jurisdiction over criminal offenses, has construed the provisions of Article 666-21 as valid in *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881 (1939), upon a factual situation almost indentical with the instant case, save that the alcoholic beverage was brought from the State of Louisiana into the State of Texas without the tax having been paid or the stamp affixed, while here the alcoholic beverage was brought from the Republic

of Mexico into the State of Texas under the same conditions.

Appellant, in contending that the tax in question violates Article I, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States, relies upon the language contained in the Customs Act (19 U. S. C. A., Sec. 1201), which refers to the payment of *duty* upon articles imported into the United States from a foreign country. Appellant attempts to strengthen this contention under the admitted fact that collection stations for the payment of the tax are only to be found at points on the border between the State of Texas and the Republic of Mexico and that no such collection stations are maintained at points on the borders between the State of Texas and the States of New Mexico, Oklahoma, Arkansas, and Louisiana.

The fallacy of this contention is demonstrated by the fact that in all cases where the importation of liquor into the State of Texas upon which the tax has not been paid and the stamp affixed, whether from the Republic of Mexico or from any other state bordering upon the State of Texas, and the possessor of the illicit beverage has been apprehended by the proper authorities, such person has been convicted under the penal provisions of the Texas Liquor Control Act. *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881 (1939); *Wyble v. State*, 140 Tex. Crim. 123, 147 S. W. 2d 243 (1940); *Chambless v. State*, 153 Tex. Crim. 5, 216 S.W. 2d 203 (1949); *Horton v. State*, 132 Tex. Crim. 488, 105 S. W. 2d 669 (1937).

The tax imposed by Article 666-21, Vernon's Texas Penal Code, is a tax imposed upon the first

possession of alcoholic beverage within the State of Texas whether such possession be for the purpose of sale or for personal use. It is not an import tax or duty imposed by the State upon the importation, only, of such beverages from a foreign country, or from any other state, and hence is a valid tax which does not contravene or violate the provisions of Article 1, Section 10, Clause 2 (the Export-Import Clause) of the Constitution of the United States.

COUNTERPOINT 2
(Restated)

2. The tax in question, being based upon the unlawful possession of intoxicating liquor within the State of Texas, did not contravene Article 1, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the United States, since, under the laws of the State of Texas, appellant had not qualified as a carrier to transport such intoxicating liquor in interstate commerce from the Republic of Mexico through the State of Texas to the State of North Carolina. (In reply to Appellant's Contention No. 2).

ARGUMENT IN SUPPORT OF COUNTERPOINT 2

Appellant's contention that since he was engaged in transporting eleven fifth-gallons of rum which he purchased in the Republic of Mexico in interstate commerce through the State of Texas for his personal use at his ultimate destination in the State of North Carolina the imposition of the tax in question was void as being violative of Article I, Section 8, Clause 3 (the Commerce Clause) of the Constitution of the

United States, is without merit under the uncontroverted facts.

As has been stated, the tax here in question is one imposed upon the unlawful possession of any illicit beverage in the State of Texas. Appellant brought into the State of Texas from the Republic of Mexico eleven fifth-gallons of liquor for his personal use, although he was permitted to lawfully import into the State of Texas not more than one quart of liquor for his own personal use upon which the tax must have been paid and the stamp showing the payment thereof affixed to the container. The importation for personal use of eleven fifth-gallons of rum into the State of Texas, whether from a foreign country or any other State was unlawful, *per se*, and by operation of law the liquor so imported became an illicit beverage. Article 666-8, Vernon's Texas Penal Code (App. p. 17). Possession of an illicit beverags makes its possessor subject to the tax. *Boles v. State*, 137 Tex. Crim. 521, 132 S. W. 2d 881.

Also, under the provisions of Article 666-27(a), Vernon's Texas Penal Code (App. p. 19), since appellant admitted that he had no permit from the Texas Liquor Control Board to possess or transport said liquor within or through the State, his possession of the illicit beverage could not have been for the purpose of lawful transportation in interstate commerce since appellant had failed to secure a permit which would have authorized its transportation in interstate commerce.

In *Fogle v. State*, 133 Tex. Cr.R. 312, 111 S.W. 2d 246 (1937), the possession of a permit to transport liquor within or through the State of Texas was construed by the Court of Criminal Appeals to be

mandatory. It being uncontroverted that appellant had neither applied for or been granted a permit under the provisions of Article 666-4(a), Vernon's Texas Penal Code (App. p. 16), to transport the liquor in question in his private automobile through the State of Texas while en route to his destination in the State of North Carolina, the decision of the Court of Appeals for the 5th Circuit in *Cartlidge v. Rainey*, 168 F. 2d 841 (1948); (cert. den. 335 U. S. 885), is applicable. In the *Cartlidge* case the liquor had been legally purchased in Louisiana and was being transported through the State of Texas, allegedly in interestate commerce, into the State of Oklahoma. No permit had been issued to the possessor of the contraband liquor by the Texas Liquor Control Board to possess or transport such liquor within or through the State of Texas. In the instant case the liquor, upon which no tax had been paid or stamp affixed thereto, was purchased in the Republic of Mexico for transportation through the State of Texas into the State of North Carolina, and appellant had not applied for or received any permit from the Texas Liquor Control Board to possess or transport such liquor within or through the State of Texas

The Court of Appeals held (p. 843) that "the effect of the Texas Liquor Control Act is to confine the business of transporting intoxicating liquors through the State to those who were licensed as common carriers", and that such "regulation was reasonable and appropriate to the end in view", citing *Ziffrin v. Reeves*, 308 U.S. 132 (1939).

After quoting from other decisions of this Honorable Court, and particularly the case of *Duckworth*

v. Arkansas, 314 U.S. 390 (1941) as to the effect of the 21st Amendment to the Constitution of the United States upon the Commerce Clause (Art. I, Sec. 8, Cl. 3), the Court then held in part as follows:

> "The scheme of the Texas Liquor Control Act is one of strict regulation, and any contention that liquor may pass through the state without a permit is contrary to Article 666-15 of the Act, which classifies permittees. The actual requirement of a permit is contained in the general prohibitions in Article 66-4. Article 666-15 does not exempt any person or class from the requirement of a permit, but merely authorizes permits to be issued to persons of designated classes. . . . (p. 844)
>
> . . . *His contention would leave interstate transportation of liquor in private motor cars free from any local regulation under the police power of the State of Texas; and we are forced to reject it.*"* (p. 845)

But appellant contends that since the liquor in question was purchased in the Republic of Mexico and was being transported by him through the State of Texas for his own personal use in the State of North Carolina, and was not intended at any time for re-sale, use, or disposal in the State of Texas (R. 35), the taxing thereof by the State of Texas was a tax on interstate commerce and therefore violative of Article, I Section 8, Clause 3 (the Commerce Clause) of the United States Constitution. Manifestly, under the undisputed facts, this theory

---

* Italics supplied.

is untenable since the attempted transportation through the State of Texas of eleven fifth-gallons of liquor for appellant's own personal use was in excess of the amount of liquor exempted under the provisions of Article 666-23(a), Section (4), Vernon's Penal Code (App. p. 19). If the untaxed liquor had been destined in interstate commerce from the Republic of Mexico to the State of North Carolina through the State of Texas by virtue of the provisions of Article 666-15, Section (12), Vernon's Texas Penal Code (App. p. 17), then unquestionably it would not have been subject to the tax since its transportation in interestate commerce would be accomplished through the agency of a permittee authorized under the Act to transport such liquor. Article 666-21, Vernon's Texas Penal Code (App. p. 18).

It may be argued that since appellant could not have obtained a permit to transport the liquor in question through the State of Texas by private automobile, the provisions of the Texas Liquor Control Act mentioned above which declare such illegally imported liquor to be an illicit beverage and therefore taxable, constitute an unreasonable regulation of the interstate liquor traffic and therefore the tax levied upon such illicit beverage is an undue burden upon interstate commerce. This contention is set at rest by the opinion in *Cartlidge v. Rainey, supra,* (at p. 845), which quotes Mr. Justice Frankfurter in *Carter v. Virginia*, 321 U.S. 131, 142 (1944), as follows:

> "Less than six years ago this court rejected the impossible task of deciding, instead of leav-

ing it for legislatures to decide, what constitutes a 'reaonable regulation' of the liquor traffic."

Appellant was here charged and convicted of possession of an untaxed, illegal beverage, and not with its transportation. Under the decisions of the Court of Criminal Appeals of Texas hereinabove cited, the various provisions of the Texas Liquor Control Act, the validity of which have been challenged by appellant, have been construed to be valid as an exercise of the police power granted to the State of Texas under Section 2 of the 21st Amendment to the Constitution of the United States and, as stated by Mr. Justice Black in *Carter v. Virginia*, 321 U.S. 131, 138.

> "I am not sure that state statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes."

Appellant has not presented a clear case of the violation of any federal statute in conflict with the provisions of the quoted sections of the Texas Liquor Control Act, nor do the cases cited in this brief refute the principles of law enunciated in the *Cartlidge* case.

CONCLUSION

It is respectfully submitted by the State of Texas, appellee herein, that since the tax in question is not violative of either Article I, Section 10, Clause 2, or Article I, Section 8, Clause 3 of the Constitution of

the United States, the judgment of the Court of Criminal Appeals of the State of Texas should be in all things affirmed.

WILL WILSON
Attorney General of Texas

C. K. RICHARDS
Assistant Attorney General of Texas
Capitol Station
Austin, Texas

Attorneys of Record for the State of Texas, Appellee.

PROOF OF SERVICE

I, C. K. Richards, one of the attorneys for the State of Texas, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1957, I served a copy of appellees' brief on I. N. Gordon, appellant herein, by mailing a copy in a duly addressed envelope with airmail postage, prepaid, to B. R. Stewart, counsel for appellant, 207 East Harriman, Edinburg, Texas, by depositing the same in the United States Postoffice at Austin, Texas, addressed to the party and at the address above mentioned.

C. K. RICHARDS
Assistant Attorney General of Texas

Capitol Station
Austin, Texas

Attorney for the State of Texas

APPENDIX

CONSTITUTION OF THE UNITED STATES

ARTICLE I, Section 8, Clause 3

To regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

ARTICLE I, Section 10, Clause 2

No state shall, without the consent of the Congress, lay any imports or duties on Import and Export, except that which may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on Imports and Exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress.

AMENDMENT XXI

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

TEXAS STATUTES*

Article 666-1

This Act may be cited as the "Texas Liquor Control Act." (p. 85)

---

* All page referer es are to Vernon's Texas Statutes (1948 Edition, Volume 2), unless otherwise indicated.

Article 666-3a

The following definitions of words and terms shall apply as used in this Act:

(1). "Alcoholic Beverage" shall mean alcohol and any beverage containing more than one-half of one per cent (½ of 1%) of alcohol by volume which is capable of use for beverage purposes, either alone or when diluted.

(2). . . .

(3). "Distilled Spirits" shall mean alcohol, spirits of wine, whiskey, rum, brandy, gin, and any liquor produced in whole or in part by the process of distillation, including all dilutions and mixtures thereof.

(4). "Illicit Beverage" shall mean and refer to any alcoholic beverages manufactured, distributed, bought, sold, bottled, rectified, blended, treated, fortified, mixed, processed, warehoused, stored, possessed, imported, or transported in violation of this Act, or on which any tax imposed by the laws of this State has not been paid and the tax stamp affixed thereto; and any alcoholic beverage possessed, kept, stored, owned, or imported with intent to manufacture, sell, distribute, bottle, rectify, blend, treat, fortify, mix, process, warehouse, store, or transport in violation of the provisions of this Act. (p. 86)

Article 666-4(a)

It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this State, export from the State, transport, distribute, warehouse, store, solicit orders for,

take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such privilege. (p. 86).

Article 666-8

No person shall import into this State any liquor, in excess of one (1) quart, from any source unless a permit be first obtained from the Board, and any person so purchasing or importing liquor in violation of this Section shall be subject to the penalties as hereinafter provided. In addition to the penalties hereinafter provided, any person violating the provisions of this section shall forfeit the liquor so imported to the Board as here provided. (p. 89).

Article 666-15(12)

Carrier Permit. The word "carrier" when used in this section shall mean and include water carriers, airplane lines, all steam, electric, and motor power railway carriers, and common motor carriers operating under a certificate of convenience and necessity issued by the Railroad Commission of Texas or by certificates issued by the Interstate Commerce Commission. The holders of such certificates shall be authorized to transport liquor into and out of this State and between points within this State. Such carriers shall furnish such information concerning the transportation of liquor as may be required by the Board.

The annual State fee for a Carrier Permit shall be Five Dollars ($5). Vernon's Texas Statutes (1950 Supplement) p. 746.

Article 666-17(13)

It shall be unlawful for any person to have in his possession, transport, manufacture, or sell any illicit beverage. Vernon's Texas Statutes (1950 Supplement) p. 754.)

Article 666-17(32)

For tax purposes only, distilled spirits contained in a container having attached thereto the Federal Liquor Strip Stamp or imported from any foreign country are hereby subject to taxation, and must have affixed thereto the appropriate Texas Tax Stamp for distilled spirits. Vernon's Texas Statutes (1950 Supplement) p. 756.

Article 666-21 (in part)

There is hereby levied and imposed on the first sale in addition to the other fees and taxes levied by this Act the following:

(a). A tax of $1.408 per gallon on each gallon of distilled spirits, provided the minimum tax on any package of distilled spirit shall be $0.088.

The term "first sale" as used in Article 1 of this Act shall mean and include the first sale, possession, distribution, or use in this State of any and all liquor refined, blended, manufactured, imported into, or in any other maner produced or acquired, possessed, or brought into this State.

The tax herein levied shall be paid by affixing a stamp or stamps on each bottle or container of liquor. . . .

It shall be the duty of each person who makes a first sale of any liquor in this State to affix said stamp on each bottle or container of liquor and to cancel

the same in accordance with any rule or regulation of the Board. . . . : Any person authorized to export liquor from this State having in his possession any liquor intended for shipment to any place without the State, shall keep such liquor in a separate compartment from that of liquor intended for sale within the State so that the same may be easily inspected and shall attach to each such package of liquor so intended for shipment without the State a stamp of the kind and character that shall be required by proper rule or regulation denoting that the same is not intended for sale within the State. When such liquors are so kept and so stamped no tax on account thereof shall be charged. Vernon's Texas Statutes (1952 Supplement) pp. 897-898.

Article 666-23a (4)

It is provided that any person may bring into this State not more than one quart of liquor for his own personal use; provided, further, that he shall pay and affix thereto the required State tax stamps. (p. 102).

Article 666-27

(a). It shall be unlawful for any person to transport into this State or upon any public highway, street, or alley, in this State any liquor unless the person accompanying or in charge of such shipment shall have present and available for exhibition and inspection, a written statement furnished and signed by the shipper, showing the name and address of the consignor and the consignee, the origin and destination of such shipment, and such other information as may be required by rule and regulation of the Board. It shall be the duty of the person in charge of such

shipment while the same is being transported, to exhibit such written statement to the Board or any of its authorized representatives or to any peace officer making demand therefor, and it shall be unlawful for any person to fail or refuse to exhibit the same upon such demand. Such written statement shall be accepted by such representative or officer as prima facie evidence of the lawful right to transport such liquor. (p. 103).